CASE NUMBER C420153

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Appellant-Petitioner,

vs.

GERALD ARMSTRONG,

Defendant.

5-9-91

BENT CORYDON,

Respondent.

Petition From the Superior Court of Los Angeles County, the Honorable Bruce R. Geernaert, Judge

---

PETITION FOR REVIEW OF DENIAL OF PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER PENDING DETERMINATION OF APPEAL STAY REQUESTED

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TEMPORARY STAY REQUESTED

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PETITION FOR REVIEW OF DENIAL OF PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER PENDING DETERMINATION OF APPEAL
STAY REQUESTED

ISSUE PRESENTED

1. Whether a stay was appropriate pending appeal, where failure to grant the stay would render the issue on appeal moot, and where:

A. There is a substantial likelihood that petitioner-appellant will prevail on the appeal; and

B. The issue on appeal is whether the the trial court properly applied collateral estoppel to an order of a federal Court of Appeals which: (1) is not final; and (2) is inconsistent with two prior decisions by two independent courts, determined on the same factual and legal issues, and

involving the same parties.

INTRODUCTION

This petition seeks a stay pending appeal of an order of Superior Court Judge Bruce Geernaert granting Bent Corydon, a non-party to the underlying action below, access to two audiotapes, denominated Ex. 500-CCCCC,[1] for his use, subject to a protective order, in another lawsuit he has brought in the Superior Court.(Exhibit A.) [2] The tapes are presently maintained under seal in the offices of the clerk of the Superior Court. Judge Geernaert stayed his order for 21 days, until May 7, 1991, to give the Church an opportunity to obtain a stay from the Court of Appeal, pending the Church's plenary appeal from the disclosure order.

The tapes had previously been ruled privileged on several occasions by Superior Court Judge Paul Breckenridge (now retired), once on a fully litigated motion for access by the United States Department of Justice, which asserted that the tapes were not privileged under the crime-fraud exception. Judge Geernaert overruled Judge Breckenridge's earlier ruling, not on the basis of an independent review of the issue, but on the highly questionable ground that the Church was collaterally estopped from asserting the privilege because of a recent independent ruling by the United States Court of

1. The tapes were not introduced into evidence in the trial of the underlying action below on the grounds that they were protected by the attorney-client privilege.

2. That lawsuit, Corydon v. Church of Scientology International, Case No. C 694401 (L.A. Cty.), is scheduled to go to trial on May 20, 1991.

Appeals for the Ninth Circuit that the tapes are not privileged. United States v. Zolin, 905 F.2d 1344 (9th Cir. 1990). It is the Church's position that Judge Geernaert committed clear error in applying the doctrine of collateral estoppel on the basis of the Ninth Circuit ruling which, apart from not being a final determination, is inconsistent with the prior holding of Judge Breckenridge and of at least one other court. As we show below, the doctrine of collateral estoppel does not apply in such circumstances.

A stay pending appeal from Judge Geernaert's order is warranted because: (1) petitioner will by definition suffer irreparable harm -- and will irretrievably lose the rights at stake in this appeal -- in the absence of a stay; and (2) petitioner will raise substantial questions of law regarding the propriety of the court's disclosure order. Petitioner's request for a stay was summarily denied by the Court of Appeal, Second Appellate District, on May 2, 1991. (Ex. B.)

Plaintiff-petitioner requests that this Court direct the Court of Appeal to issue a writ of supersedeas staying the Superior Court's disclosure order pending the Court of Appeal's decision on petitioner's appeal of the Superior Court's order, and any subsequent appeals, if necessary. Plaintiff-petitioner also requests a temporary stay pending disposition of this petition, if this court does not reach a disposition of this petition before May 7, 1991, the date the trial court's stay terminates.

FACTUAL AND PROCEDURAL HISTORY

1. The underlying lawsuit below was brought in 1982 by

the Church to recover private documents converted by defendant Gerald Armstrong ("Armstrong"). Shortly after the initiation of the lawsuit, Superior Court Judge Cole issued a temporary restraining order and then a preliminary injunction requiring Armstrong to submit the documents he had taken to the clerk of the court under seal. Exhibit C.[3/] Among the documents surrendered was exhibit 500-CCCCC, which consists of two audio tapes of attorney-client meetings conducted in 1980, and five other exhibits (hereinafter "the five exhibits").[4/] The tapes and "the five exhibits" have been held by the clerk of the Supreme Court under seal since they were delivered to the court by Armstrong pursuant to Judge Cole's order.

2. When the underlying case went to trial on the Church's claims before Judge Breckenridge in May 1984, Armstrong attempted to introduce the tapes into evidence, claiming they came within the crime-fraud exception to the attorney-client privilege. Judge Breckenridge refused to admit them into evidence, finding that they presumptively were protected by the privilege. Exhibit D. At the conclusion of the trial, Judge Breckenridge maintained the seal on the tapes and on all other documents which had been surrendered to the clerk and which were not admitted into evidence. Neither the tapes nor "the five exhibits" were admitted into evidence. Exhibit E, at p. 2 and fn. 1.

---

3. The exhibits referred to in this memorandum were submitted to the Superior Court and were attached to the Petition for Writ of Supersedeas below.

4. Exhibits 500-5K, 500-5L, 500-50, 500-5P and 500-60.

3. On February 25, 1984, the United States Justice Department served a subpoena on the clerk of this court seeking access to the tapes and several other exhibits, for use in two then-pending civil actions. Judge Breckenridge denied the Justice Department access to the tapes. Exhibit F (court order).

The issue of whether the tapes were protected by the attorney-client privilege was fully and fairly litigated before Judge Breckenridge. The Justice Department argued that the tapes came within the "crime-fraud" exception to the privilege, and submitted a declaration of Gerald Armstrong which included extensive excerpts of the tapes. (Prior to surrendering the tapes to Judge Cole, Armstrong had listened to the tapes, transcribed what he deemed to be the most "damaging" portions, and included the excerpts in a declaration which he made available to the Justice Department and other litigants who had sued Churches of Scientology. The same Armstrong declaration was later submitted by Corydon in support of his motion below for access to the tapes.) Judge Breckenridge ruled that the Justice Department had failed to show, through the excerpts or any other evidence, that the tapes came within the crime-fraud exception to the privilege. Judge Breckenridge explicitly considered the excerpts in reaching his decision, but refused to go further and listen to the tapes themselves, finding that he was forbidden to do so by California law. See Exhibit G (transcript of proceedings), pp. 51, 75. Judge Breckenridge stated his holding:

It brings us down to a problem of where this

> attorney-client privilege stands and the role of the attorney, while I suppose it has been denigrated in the public media from time to time it still plays an important role in our society and in the manner in which we deal with the courts and government and so forth. I think that probably on balance that the public policy which favors full and open communication between a client and lawyer has to prevail over the suggestion that there was some secret intent on the part of the person who is communicating with the lawyer.
>
> It would be too easy to set aside the privilege if that were the fact, at least in the absence of very strong evidence to that effect.
>
> So I am going to sustain the privilege solely as to what is on that tape. I don't want anybody suggesting that I have gone any further than that. Just as to what is on that tape is concerned, I am finding that privileged. I will sustain the objection.

Id. at 75-76.

4. The Justice Department appealed Judge Breckenridge's ruling, but then dismissed the appeal.

5. Meanwhile one of the private civil litigants to whom Armstrong had given his affidavit with the tape excerpts filed the affidavit in a pleading in federal court in New York. The Church moved to strike the declaration because it contained attorney-client privileged material. The United States District Court for the Southern District of New York upheld the privilege and rejected the crime-fraud argument, explicitly holding that there existed "no significant evidence . . . that the restructuring project . . . involved the intended commission of a fraud." Bear v. Church of Scientology of New York, et al., 81 Civ. 4688, 6864 (Dec. 5, 1985). Exhibit H.

6. Independently of the Justice Department's attempt to obtain the tapes from Judge Breckenridge for use in non-tax civil litigation, the Internal Revenue Service began a summons enforcement action in federal district court in Los Angeles to obtain the tapes for purposes of a tax investigation. This was the Zolin case. Like the Justice Department, the IRS argued that the tapes came within the "crime-fraud" exception, relying on the same excerpts contained in the Armstrong declaration[5/], which two courts -- including the Los Angeles Superior Court in this case -- previously had held to be insufficient to show that the privilege was overcome by the crime-fraud exception. Federal District Judge Harry Hupp likewise rejected the government's showing, finding that, "the quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned." Exhibit I.

7. The United States Court of Appeals for the Ninth Circuit affirmed Judge Hupp's order denying the IRS access to the tapes, but on a different ground. United States v. Zolin, 809 F.2d 1411 (9th Cir. 1987). The court held that Judge Hupp should not have considered even the partial transcripts of the tapes set forth in the Armstrong declaration, but rather should have considered only evidence completely independent of the tapes themselves. Finding that the independent evidence did not make out an ongoing crime or fraud, the court affirmed Judge Hupp's order.

5. In Zolin, the government submitted a longer version of the transcript, but relied entirely on the same portions as were transcribed in the Armstrong declaration.

8. The Ninth Circuit granted the IRS' petition for review en banc. United States v. Zolin, 832 F.2d 127 (9th Cir. 1987). After oral argument, however, the en banc court dismissed the writ as improvidently granted, and reinstated the panel decision. United States v. Zolin, 842 F.2d 1135 (9th Cir. 1988). Three members of the en banc court dissented, arguing that the panel's strict version of the independent evidence rule was improper, and urging a more flexible approach. Significantly, the en banc dissenters would have affirmed Judge Hupp's order denying the IRS access to the tapes, on the grounds that he acted properly in finding that the crime-fraud exception had not been made out by the excerpts of the tapes. Id.

9. On certiorari, the Supreme Court rejected both the strict independent evidence rule and the government's position that would have required in camera review of otherwise privileged documents. Rather, the Court articulated the standard under which in camera review of privileged material might be undertaken:

> Before engaging in in camera review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982), that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.
>
> Once that showing is made, the decision whether to engage in in camera review rests in the sound discretion of the district court.

Zolin, 109 S.Ct. at 2631. The Court further held that "the threshold showing to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged." Id. at 2632 (emphasis added). The Court noted that whether the partial transcripts were privileged and whether they were lawfully obtained remained an open question, id. at 2624 n. 5, 2631, and remanded to the court of appeals. Id. at 2632.

10. On remand, the Ninth Circuit panel brushed aside all such questions and held, contrary to the previously expressed holdings or views of Judge Breckenridge of this Court, of the Southern District of New York in the Bear case, of Judge Hupp and of the three Ninth Circuit dissenters from the en banc order, that the partial transcripts contained in the Armstrong declaration indeed did make out the crime-fraud exception. The Ninth Circuit remanded to Judge Hupp for further proceedings.

11. The Church filed a petition for writ of certiorari to the Supreme Court of the United States on December 18, 1990. The Supreme Court denied the petition on March 18, 1991. 59 L.W. 3636.

12. On October 11, 1988, while the Zolin case was first pending before the Supreme Court, Bent Corydon, a non-party to this case, filed a motion to unseal the file in this case, which was granted on November 9, 1988. Exhibit J. On the Church's motion for reconsideration, the Superior Court (Geernaert, J.) excluded the tapes from its unsealing order on the grounds that they were privileged. Exhibit K

(transcript of hearing of November 30, 1988) at 11; Exhibit L (Minute Order, November 30, 1988).

13. The Church appealed Judge Geernaert's unsealing order, and Corydon cross-appealed from Judge Geernaert's order denying him access to the tapes. Appeal No. B 038975 (Division 3), appeal pending. Corydon briefed to this Court his argument that he should be permitted access to the tapes. Before oral argument, however, Corydon sua sponte dismissed his cross-appeal. Exhibit M.[6/]

14. At the same time that he dismissed his cross-appeal, Corydon filed a new motion before Judge Geernaert seeking access to the tapes, based upon the decision of the Ninth Circuit on Zolin.[7/] Several hearings were held before Judge Geernaert, at which he stated that he would make an independent determination of the privilege issue, and, if necessary, would review the tapes in camera.

15. Despite these prior statements, on April 16, 1991, Judge Geernaert held that he would grant Corydon's motion on the basis of the doctrine of collateral estoppel, arising out of the Zolin decision. Exhibit A. Judge Geernaert stayed his decision for 21 days to permit this application for a stay pending appeal.

ARGUMENT

INTRODUCTION

The rule is well-established that "the courts will grant

6. Oral argument on the Church's appeal was held on February 20, 1991.

7. Corydon, of course, could have raised the Zolin decision as supplemental authority in his pending appeal in this court.

supersedeas in appeals where to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him." People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville, 69 Cal.App.2d 533, 72 Cal.Rptr. 790, 892 (Ct.App. 1968) en banc (quotation omitted).

Issuance of a writ of supersedeas is proper where: (1) the appellant would otherwise irretrievably lose the right he seeks to vindicate on appeal, while respondent is less likely to be prejudiced by grant of a stay; and (2) the appellant raises either "substantial issues" or "difficult questions" of law on appeal. Id. at 793; Davis v. Custom Component Switches, Inc., 13 Cal.App.3d 21, 91 Cal.Rptr. 181, 185 (Ct.App. 1970); Mehr v. Superior Court, 139 Cal.App.3d 1044, 189 Cal.Rptr. 138 (Ct.App. 1983).

I. DENIAL OF A STAY WOULD IRRETRIEVABLY COMPROMISE PETITIONER'S ASSERTION OF PRIVILEGE WITH RESPECT TO THE TAPES

The tapes are recordings of attorney-client conferences held over a decade ago with the then-attorneys for the Church and L. Ron Hubbard. Corydon seeks them for use in his pending lawsuit against the Church; the Superior Court has ruled that the tapes are relevant to Corydon's case. Thus it is indisputable that if Corydon is granted access to the tapes, even temporarily, the privacy and integrity of the attorney-client conferences will be irretrievably compromised. Even if Corydon ultimately is not permitted to introduce the tapes into evidence in his case, he will have gained invaluable insights from his access to confidential

attorney-client consultations on subjects deemed relevant to his case. Once such access is granted, it will not be possible for this Court to "unring the bell" if it ultimately reverses Judge Geernaert's ruling. Manness v. Myers, 419 U.S. 449, 460 (1975) (holding that disclosure of privileged information necessarily results in irreparable harm; "subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error"). In this case, the damage indisputably will have been done; the privilege will have been improperly destroyed. California courts, like the United States Supreme Court, have recognized the need to protect private or privileged material pending appeal. See Champion v. Superior Court, 201 Cal.App.3d 777, 247 Cal.Rptr. 624 (Ct. Appeal 1988).

Any hardship to Corydon arising from the fact that his lawsuit is scheduled to commence trial on May 20, 1991 is of his own doing. Corydon originally sought access to the tapes on October 11, 1988; he was denied. He appealed from that ruling, and briefed the issue in this Court. Then, prior to argument, he dismissed the appeal and brought a new motion in the Superior Court. Had Corydon proceeded with his cross-appeal in this Court on the issue of the tapes, an appellate decision would be imminent. Corydon's tactical ploy of dismissing his appeal and bringing a new motion in the Superior Court created whatever exigency now exists in terms of the imminence of the trial date. Corydon should not be permitted to utilize his ploy as a means to deprive petitioner

///

of a stay and of effective appellate review.[8/]

In any event, Corydon has estimated that trial of his case will take approximately 60 trial days, or 15 weeks. (The Church has estimated that trial could go on considerably longer.) If necessary, the appellate process can be expedited to ensure a final decision well before the conclusion of the trial.

II. PETITIONER WILL RAISE SUBSTANTIAL QUESTIONS ON THE MERITS OF THE COLLATERAL ESTOPPEL ISSUE, AND IS LIKELY TO SUCCEED ON ITS APPEAL

It is critical to recognize the context in which the purported collateral estoppel arises in this case. As we have shown, prior to the most recent decision of the Ninth Circuit in Zolin, the petitioner twice has prevailed on the very same issue with respect to the tapes in two different jurisdictions, including in the Superior Court itself in this very case. The prior rulings of the Superior Court on the Justice Department's motion for access to the tapes and of the United States District Court for the Southern District of New York in the Bear case preclude the application of the collateral estoppel doctrine against the Church based upon the independent contrary views of the Ninth Circuit.

The Supreme Court has stated that offensive use of the collateral estoppel doctrine would be unfair "if [as in this case] the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in

8. Indeed, if any party is barred by doctrines of judicial estoppel, it is Corydon, who litigated the issue of his access to the tapes against the same party and lost.

favor of the defendant." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979). The rationale is stated in the Restatement (Second) of Judgments, section 29 comment f:

> f. Inconsistent prior determinations. Giving a prior determination of an issue conclusive effect in subsequent litigations is justified not merely as avoiding further costs of litigations but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. The inference, rather, is that the outcome may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence. That such doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against the adversary.

Quoted and followed in Jack Faucett Associates v. American Telephone & Telegraph Co., 744 F.2d 118, 129-30 (D.C. Cir. 1984). Accord, Crawford v. Ragner Insurance Company, 653 F.2d 1248, 1252 (9th Cir. 1981); Brumley Estate v. Iowa Beef Processors, Inc., 704 F.2d 1351, 1355-56 (5th Cir. 1983) ("We see no justification for granting collateral estoppel effect to two judgments and ignoring a third contrary Judgment"); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 (5th Cir. 1982).

The California courts have followed the Parklane/ Restatement rule. In Sandoval v. Superior Court of Kings County, 140 Cal.App.3d 932, 190 Cal.Rptr. 29 (1983), the court reasoned that the principles concerning the effect of inconsistent verdicts on the application of collateral

estoppel that underlay Parklane and Hardy (a Fifth Circuit case cited above) "are equally pertinent to the state court actions." 190 Cal.Rptr. at 37. The court concluded that the presence of two inconsistent verdicts foreclosed the court below from giving a preclusive effect to one of the judgments. Id. at 38. See also, Imen v. Glassford, 247 Cal.Rptr. 514 (1988).

There is a second reason why collateral estoppel cannot apply; the decision of the Ninth Circuit in Zolin is not a final order. The Ninth Circuit remanded the case to the district court to permit the Church to make further "objections" to the release of the tapes. 905 F.2d 1345. On remand, the district court refused to permit any such objections, but stayed release of the tapes for 21 days to permit the Church to seek a stay from the Ninth Circuit pending further appeal. Such an application has been made, and is pending. In any event, the release of the tapes to the IRS will not be final until all appeals are exhausted. Since collateral estoppel can apply only with respect to final judgments, it cannot apply at the present time with respect to the Zolin case.

Thus, at the very least, a substantial question is raised here as to the propriety of Judge Geernaert's ruling, which is predicated exclusively on the doctrine of collateral estoppel. A stay is required to preserve petitioner's right to challenge the clearly questionable ruling.

CONCLUSION

Petitioner has demonstrated that it will be irreparably

harmed if the disclosure order is not stayed and that it has substantial arguments that the order should be reversed. For these reasons, petitioner should be granted a stay pending appeal. This should direct the Court of Appeal to issue a Writ of Supersedeas, granting a stay until after there is determination of the appeal.

Dated: May 3, 1991

Respectfully submitted,

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Counsel for Petitioner

Exhibit A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 56

DATE 04/16/91

HONORABLE BRUCE R. GEERNAERT JUDGE | J. SWEET DEPUTY CLERK

HONORABLE JUDGE PRO TEM

[2] M MEDARIS ASST.CLK CT ATT / Deputy Sheriff | H CANNON Reporter / ERM (Parties and counsel checked if present)

9:00 am C420153
Church of Scientology of Calif.
vs.
Gerald Armstrong,

Counsel for Plaintiff: ERIC LIEBERMAN (X)
QUINN, KELLY & MORROW
BY: JOHN J. QUINN (X)

Counsel for Defendant: TOBY L. PLEVIN (X)

NATURE OF PROCEEDINGS.

MOTION OF THIRD PARTY BENT CORYDON TO EXAMINE AND COPY EXHIBIT 300 CCCCC;

.

The motion is granted. The tapes are ordered unsealed under the same conditions as the previous unsealing order.

.

The order is stayed for 21 days from this date.

.

Moving party to submit within 1 day an attorney order either approved as to form or accompanied by written objections.

MINUTES ENTERED
04/16/91
COUNTY CLERK

EXHIBIT B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 5 DATE: 05/02/91

Quinn, Kully & Morrow
John J. Quinn
520 S. Grand Avenue
8th Floor
Los Angeles, CA. 90071

RE: Church of Scientology of California
vs.
Armstrong, Gerald
Gorydon, Bent
2 Civil B058119
Los Angeles No. C420153

THE COURT:

The petition for writ of Supersedeas & Stay is denied.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Blvd., Suite 2000, Hollywood, California 90028.

On May 30, 1991, I caused to be served the foregoing document described as PETITION FOR REVIEW on interested parties in this action as below:

SEE ATTACHED LIST

If hand service is indicated, I caused the above-referenced paper to be served by hand, otherwise I caused such envelopes with postage thereon fully prepaid to be placed in the United States mail at Hollywood, California.

Executed on May 30, 1991, at Hollywood, California.

Gerald Armstrong
P.O. Box 751
San Anselmo, CA 94960

Toby L. Plevin **HAND SERVED**
Attorney at Law
10700 Santa Monica Blvd.
Suite 4300
Westwood, CA 90025

Court of Appeal **HAND SERVED**
Second Appellate District
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Los Angeles County Superior Court
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